IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

No. [redacted]

AND

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

No. [redacted]

ROCK ISLAND MOTOR TRANSIT COMPANY, TRAFFIC BUREAUS and/or CHAMBERS OF COMMERCE OF DAVENPORT, IOWA CITY, CEDAR RAPIDS, NEWTON, DES MOINES, ATLANTIC, HARLAN, OTTUMWA AND MASON CITY, IOWA, and ROCK ISLAND MOTOR TRANSIT COMPANY EMPLOYEES COMMITTEE, *Intervenors-Appellees*.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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CITATIONS

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AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

No. 961

AND

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

No. 973

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 9(c) of the revised rules of this court, intervenor-appellees, Rock Island Motor Transit Company, Traffic Bureaus and/or Chambers of Commerce of Davenport, Iowa City, Cedar Rapids, Newton, Des Moines, Atlantic, Harlan, Ottumwa and Mason City, Iowa, and Rock Island Motor Transit Company Employees' Committee, move that the judgment of the District Court of the District of Columbia be affirmed, on the ground that it is manifest on the face of the record and the jurisdictional statements that the legal questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

This is a direct appeal from a final judgment entered January 27, 1956, by a three judge district court convened pursuant to 28 USC, Sections 2281 and 2325, which dismissed appellants' complaint to set aside and enjoin an order of the Interstate Commerce Commission. The order of the Commission under attack, dated November 22, 1954 (reconsideration denied July 6, 1955), granted to intervenor Rock Island Motor Transit Company, a certificate of public convenience and necessity authorizing motor carrier service over regular routes extending between Silvis, East Moline, Moline and Rock Island, Illinois, across the state of Iowa, via U. S. Highway 6, and other designated highways to Omaha, Nebraska, and to numerous intermediate and off-route points.

STATEMENT

As shown by appellants' jurisdictional statements this case has an extensive background of proceedings before the Interstate Commerce Commission and the courts. The history prior to September 1951 has no bearing upon the legal questions presented. Appellee-intervenor, Rock Island Motor Transit Company, was authorized by the Commission on April 1, 1938 to acquire all physical assets and existing motor carrier authority of White Line Motor Freight Company, one of the earliest motor carriers operating between Chicago, Illinois and Omaha, Nebraska. Rock Island Motor Transit Company-Purchase-White Line M. Frt., 5MCC451. The Commission made all requisite findings required by Section 213 of the Motor Carrier Act and imposed certain conditions, among them being a reservation of "such further specific conditions as the Commission in the future may find it necessary to impose in order to insure that the service shall be auxiliary to or supplemental of train serv-

ice." On November 28, 1945, in 39MCC821, the Commission authorized Motor Transit to acquire the motor carrier certificate of the Frederickson & Son line in Western Iowa. Without evidence before it as to the effect upon the communities served, the Commission on April 11, 1949, in 55MCC567, having re-opened the White Line and Frederickson cases, restricted both certificates by requiring that shipments be confined to those moving on rail billing, and at rail rates and by imposing so-called "key point restrictions"[1] at Omaha, Nebraska, Des Moines, Iowa, and collectively at Davenport and Bettendorf, Iowa, and Rock Island, Moline and East Moline, Illinois. These restrictions prevented operation of the Transit Company as a motor carrier for transportation of shipments by motor vehicle under motor carrier billing, and thus, by virtue of the restrictions, appellee-intervenor's operations were reduced to rendering a pickup and delivery service for rail shipments between key point stations.

Appellee-intervenor, Rock Island Motor Transit, challenged the power of the Commission to so modify its certificates by an action instituted in the United States District Court for Northern Illinois at Chicago, in which the Commission order was enjoined. This court, by vote of five justices, and with four justices dissenting, sustained the power of the Commission to modify the certificates and impose the key point restrictions in *United States vs. Rock Island Motor Transit Company*, 340 US 419, 71 S. Ct. 382, 95 L. Ed. 391, (rehearing denied, 341 US 906).

Upon the issuance of the mandate of this Court, Motor Transit's suit in the United States District Court for North-

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[1] The key point restrictions were as follows: No shipments shall be transported by Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa and Rock Island, Moline and East Moline, Illinois.

ern Illinois was dismissed. Thereafter, Motor Transit filed an Application for temporary authority to render service over the White Line and Frederickson routes, supported by a large number of affidavits of shippers and receivers of freight at practically all points. The Commission granted temporary restricted authority to continue service over portions of the routes involved. Application for permanent authority over these same routes, under Section 207 (49 USC 307) was filed October 26, 1951. Extensive hearings were held and the testimony of approximately 180 witnesses was taken. The examiner who heard the evidence, filed an exhaustive opinion in which he found that service of Motor Transit Company was the only service available to a large number of intermediate and off-route points, that public convenience and necessity required motor carrier authority, without key point restrictions, and recommended that a certificate issue accordingly. The Commission by its report and order of November 22, 1954, adopted the substance of its Examiner's findings, directed the issuance of a certificate but imposed the following conditions:

> 1. That there be attached from time to time to the privileges granted herein such reasonable terms, conditions and limitations as the public convenience and necessity may require, and
>
> 2. That all contractual arrangements between Motor Transit Company and the Rock Island Railroad be reported to us and shall be subject to revision.

Appellants' jurisdictional statements present but two legal questions for the consideration of this court:

First, by reason of the Transportation Policy and Section 5(2)(b) of The Interstate Commerce Act, the Commission may not grant to any railroad company, or its affiliate,

a certificate authorizing unrestricted motor carrier service, as distinguished from motor transportation of rail billed freight. This they urge is the law even though public convenience and necessity for motor carrier service be shown by overwhelming evidence.

Second, the evidence before the Commission is insufficient to support the findings that public convenience and necessity require operation of appellee-intervenor as a motor carrier between the points, and over the routes, involved.

The District Court disposed of these contentions in an opinion prepared by Circuit Judge Prettyman, in which as to the first contention the court said:

> "Certainly the terms of the requirement as to auxiliary and supplementary service do not appear in Section 207(a). It is equally certain that the policy of the requirement, being a basic policy in the statute, does apply. The difference between a rigid requirement and an applicable policy is one of flexibility and permits the Commission to be governed in exceptional circumstances by the needs of the public convenience and necessity."

With respect to the second question, the court said:

> "We think the position of the Commission is well taken on the evidence. Voluminous testimony was produced. The findings are extensive. The conclusion that the grant appears necessary in the public interest is well founded. Judgment will be rendered for the defendants."

ARGUMENT

The decision of the Commission in the case at bar involves no departure from previous policies or practices. Since the enactment of the Motor Carrier Act, the Commis-

sion has consistently ruled that in proper cases, where necessary to secure adequate service, rail carriers may acquire unrestricted motor carrier authority under Section 207 or under Section 5(2)(b).

Santa Fe Trail Stages, Inc.—Control—Central Ariz.
1 MCC 225
St. Andrews Bay Transportation Co.—Extension—
3 MCC 711
Rock Island Motor Transit Co.—Extension, Wellman, Ia.
31 MCC 643
Interstate Transit Lines—Extension—Verdon, Nebr.
10 MCC 665
Santa Fe Trail Stages, Inc.—Common Carrier Application—
21 MCC 725
Burlington Transportation Co.—Extension—Council Bluffs, Ia.—
28 MCC 783
Texas & Pacific Motor Transport Co.—Extension—Point Blue, La.
17 MCC 425
Santa Fe Trail Transportation Co.—Extension—Joplin, Mo.
41 MCC 471
Burlington Truck Line, Inc.—Extension—Iowa—
48 MCC 516
Clinton, Davenport & Muscatine Ry. Co.—Extension—
24 MCC 250
Southern Pacific Co.—Control, Pac. Motor Trucking Co.—Purchase, Lowinel Trucking Co.
60 MCC 373

Appellants, at various points in their jurisdictional statements, urge that the Commission has recognized its lack of power to grant certificates authorizing motor carrier operations to railroad companies, or their subsidiaries. At other points it is charged that in granting the certificate

to appellee-intervenor the Commission has disregarded its own precedents, and that a new policy has been inaugurated with this decision.

Nothing could be further from the fact. Since the enactment of the Motor Carrier Act in 1935, the Commission has had many occasions to consider operations of trucks and passenger buses by railroad companies. In numerous instances applications under Section 207 of the Act have been granted with no restrictions. In others, restrictions have been imposed. The Commission has said in the absence of "unusual circumstances" it will not ordinarily grant to a subsidiary of a railroad, unrestricted motor carrier rights, but it is very significant that "unusual circumstances" have been found to exist in a rather large number of cases. In many of those cases the evidence of public need was not so strong as in the case at bar.

In one of the earliest decisions rendered under the Motor Carrier Act in *St. Andrews Bay Transportation Co.—Extension*—3 MCC 711, the Commission pointed out that the provisions of Section 213 of the Act (now embraced in Section 5(2)(b)) requiring a finding that operation of a motor carrier by a railroad would not unduly restrain competition had no application to a proceeding under Section 207 of the Act.

In *Rock Island Motor Transit Co.—Extension Wellman, Iowa*, 31 MCC 643, appellee-intervenor applied for a certificate authorizing service between Iowa City, Kalona and Wellman, Iowa. Division 5 imposed restrictions limiting the service to be performed to movement of shipments on rail billing and at rail rates. The entire Commission removed this restriction and granted unlimited motor carrier authority.

In MCF 5573, *Southern Pacific Co.—Purchase—Lowinel*

Trucking Co.—60 MCC 373, Division 1 of the Commission said:

> "Under the circumstances here involved we are of the opinion that an exception to the principles discussed in Rock Island Motor Transit Co.—Purchase—White Line M. Frt., 40 MCC 457, is warranted, and that the service to be rendered by vendee under the unified duplicate operating rights should not be limited solely to the transportation of freight in the service auxiliary to or supplemental with train service. Our findings accordingly will not be restricted."

Quotations from numerous decisions by the Commission might be supplied at this point. To do so would unduly extend this argument. In each of the cases cited above unrestricted motor carrier authority was granted to a railroad, or a rail carrier subsidiary. Some of the cases cited arose under Section 5(2)(b) and others under Section 207. The policy of the Commission has consistently been based on the facts of particular cases and the needs of the territory served.

Neither the National Transportation Policy nor Section 5(2)(b) of the Act prohibit the Commission from issuing certificates of public convenience and necessity for motor carrier operations, merely because the applicant therefor is affiliated with a railroad.

United States of America, et al, Rock Island Motor Transit Co., et al, 340 US 119, 95 L. Ed. 391, 71 S. Ct. 382.

Interstate Commerce Commission v. Parker, et al, 326 US 60, 89 L. Ed. 2051.

Baldly stated, appellants contend that various provisions of the Act, when read together, prohibit the Commission from issuing motor carrier authority to railroad companies,

or persons controlled by railroads. They advance this contention in the face of express provisions of Section 5(2)(b) which specifically empower the Commission to authorize railroads to acquire *motor carriers* if certain requisite findings be made. In other words, it is the position of appellants that Congress has prohibited that which the Act expressly says may be done under certain conditions.

First, it is to be noted that the proviso of Section 5(2)(b) relates only to railroad acquisition of *existing* motor carriers. This provision was clearly designated as a safeguard against monopoly. The fear had been expressed that railroads might buy up truck lines and thus obtain a monopoly in the transportation field. The evidence in the case at bar shows that no monopoly exists or is threatened by the operations of appellee-intervenor.

Second, the construction of Sections 207 and 5(2)(b) for which appellants contend would defeat the obvious Congressional intent. Congress has expressly authorized railroad companies to acquire *motor carriers* if the findings specified in 5(2)(b) are made by the Commission. Appellants' contention is that the statute should be construed as authorizing a railroad to acquire only the vehicles used by a motor carrier and use them in its operation as a railroad. The language of 5(2)(b) negatives any such Congressional intent. It is motor carriers which may be acquired. Nothing in the Act supports such a tortured construction of the Act.

Third, the language of Section 207 is plain and unambiguous and expressly authorizes the issuance of a certificate to any qualified person when the requisite findings of public convenience and necessity, and fitness of the applicant, are made by the Commission. The statute requires no resort to extraneous matters to determine the legislative intent.

Fourth, nothing contained in the National Transportation Policy negatives the power of the Commission to grant to a railroad, or person affiliated with a railroad, authority to operate as a motor carrier. The National Transportation Policy is not concerned with the ownership of the facilities of commerce, but with service to the public, and the development of transportation to attain the objectives set forth. Nothing in the National Transportation Policy indicates any Congressional purpose to prohibit railroads from operating trucks as motor carriers, and there is no intimation that Congress was interested in restricting the development of truck transportation by railroads.

Fifth, this court, in at least two cases, has clearly indicated that the contentions of appellants here find no support in the provisions of the Act, or the National Transportation Policy. In *U. S. A. v. R. I. M. T. Co., et al*, 340 US 119, 95 L. Ed. 391, Mr. Justice Reed, speaking for this court, said:

> "At present a motor service is auxiliary and supplemental to rail service, in the Commission's view, when the railroad affiliated motor carrier in a subordinate capacity aids the railroad in its rail operations by enabling the railroad to give better service or operate more cheaply rather than independently competing with other motor carriers. Undoubtedly, the Commission has not consistently required each rail affiliated motor carrier to foregoing motor billings or tariffs. Key points to break traffic are relatively new. 28 M.C.C. 5. Rail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service. Those divergencies, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission. It is because Congress could not deal with the multitudinous and variable situations that arise that the Commission was given authority to adjust services within the limits of the Motor Carrier Act, Sec. 208."

Also in *Interstate Commerce Commission v. Parker*, 326 US 60, 89 L. Ed. 2051, it appeared that the Commission had granted a restri certificate to a subsidiary of Pennsylvania R. R. C authorizing over the road truck movement for shipments moving on rail billing, and at rail rates. A three judge district court annulled the order of the Commission because there were existing motor carriers serving the territory who were ready, willing and able to perform transportation of such rail billed freight. This court reversed the three judge district court and said:

> "The National Transportation Policy has recently been authoritatively summarized by Congress. That declaration requires administration so as to preserve the inherent advantages of each method of transportation and to promote 'safe, adequate, economical and efficient service.' Such broad generalizations, while well expressing the Congressional purpose, must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress."

After discussing the discretion vested in the Commission to regulate various types of transportation this court went on to say:

> "The alternative to the existence of this discretion is that the language of the Interstate Commerce Act, part II, forbids the granting to railroads of a certificate of convenience and necessity for the operation of motor trucks, under specially limited certificates, when there are certificated motor carriers, independent of railroad authority or supervision, with whom arrangements for the service might be made by the rail carriers. There is no such prohibition in terms. Any such implication is negated by the discretion to grant certificates conferred on the Commission by the Act."

The finding of the Commission that public convenience and necessity require the authority granted is supported by substantial evidence and is to be accepted by the courts.

U. S. A. v. Pierce Auto Freight Lines, 327 US 515, 90 L. Ed. 121
Interstate Commerce Comm. v. Parker, 326 US 60, 89 L. Ed. 2051
U. S. A. v. Pennsylvania R. R. Co., 323 US 612, 89 L. Ed. 409
McLean Trucking Co. v. U. S. A., 321 US 67, 88 L. Ed. 544

Appellants' jurisdictional statements do not challenge the finding of the Commission that appellee-intervenor, Rock Island Motor Transit Company, is the only carrier rendering a regular transportation service to a host of intermediate and off-route points in Iowa. Before the court below appellants argued that the evidence was insufficient to support the Commission's findings that public convenience and necessity required the service of Rock Island Motor Transit Company. They have apparently shifted their position and now urge that, while there is evidence sufficient to support a finding of public convenience and necessity as to the small intermediate communities, there is insufficient evidence that such service is required at the larger centers of population such as Davenport and Bettendorf, Iowa, Rock Island, Moline, East Moline, Illinois, Des Moines, Cedar Rapids, Council Bluffs, Iowa and Omaha, Nebraska.

Motor Transit holds the only outstanding intrastate certificates authorizing service on the White Line and Frederickson routes, and transports rail shipments on rail billing for its parent company. For more than twenty years appellee-intervenor and its predecessors in title and interest have been performing a dependable interstate motor carrier service to all communities on its routes, large and small. The Commission pointed out in its report and order

that by combining intrastate and rail traffic with interstate shipments intervenor was in much better position to continue to perform "peddler" service to the small intermediate and off-route communities than were the appellants here, that such service involved a high percentage of truck mileage with practically empty vehicles, and was expensive to maintain. The Commission concluded that any restriction upon the ability of Motor Transit to continue this character of service was not in the public interest because protesting motor carriers would be unable to provide comparable service for interstate traffic alone. Motor Transit would be left to handle all intrastate and rail billed traffic, the volume of which would not warrant continuance of its present service to the smaller intermediate communities. We submit the conclusion of the Commission is supported by substantial evidence, and the court below properly held that

> "The conclusion that the grant appears necessary in the public interest is well founded."

The question as to the extent of the authority to be granted to Rock Island Motor Transit Company was within the discretion of the Commission with which the courts are in no manner concerned.

CONCLUSION

The decision of the Commission in this case is in strict accord with prior decisions and policies which the Commission has followed since the enactment of the Motor Carrier Act. Neither the National Transportation Policy nor the provisions of Section 5(2)(b) of the Act, restrict the power of the Commission to authorize certificates for the performance of motor carrier service which it has found pub-

lic convenience and necessity require. The construction of Section 5(2)(b), for which appellants contend, is contrary to the Congressional intent.

The sufficiency of the evidence to support the Commission's findings is clearly within the orbit of Commission discretion. We, therefore, say it is manifest on the face of the record and the jurisdictional statements that the legal questions presented are so unsubstantial as not to require further argument. The judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have today served the foregoing "Motion to Affirm" of Rock Island Motor Transit Company, et al, upon each of the parties and upon the Solicitor General of the United States, pursuant to the requirements of Rule 33, by depositing copies of the same in envelopes in the United States Post Office at Des Moines, Iowa, with

First Class Postage prepaid thereon, addressed to each of the following counsel of record for the parties designated:

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